No. 8947

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

b

William King White, Elizabeth White King, Rollin Henry White, Jr., R. H. White and Katherine King White,
Appellants,

vs.

Penelas Mining Company (a corporation), Debtor,
Appellee.

APPELLANTS' OPENING BRIEF ON MERITS AND MOTION TO DISMISS.

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(B) The debtor's petition was not filed with the actual purpose of effecting a reorganization but for the purpose of hindering and delaying the appellants, R. H. White and Katherine King White, the sole creditors of the debtor corporation;

(C) No possible, feasible or practical plan of reorganization could be proposed and any plan that might be proposed would necessarily be speculative and impracticable;

(D) The debtor's petition did not show honesty of purpose, motive and intent.

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APPELLANTS' OPENING BRIEF ON MERITS.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS ON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION.

The Penelas Mining Company, as petitioner, on June 1, 1938 filed a Petition (R. 1-9) for reorganization and relief under the provisions of Section 77B of the Bankruptcy Act, USCA, Title 11, Section 207, asserting in its Petition that the value of its assets was $334,389.00 and its liabilities $173,449.86, of which an aggregate of $165,876.82 was due to R. H. White and Katherine King White, and all of which was due and owing on June 1, 1938. That petitioner is in-

solvent in that it is unable to meet its debts as they mature and is in need of rehabilitation and desires to effect a plan of reorganization under the provisions of the Bankruptcy Act, as amended.

On the date of the filing of the Petition, the District Court made and entered an order approving the Petition (R. 9), and continuing the debtor in possession pending a hearing on the question of permanently continuing the debtor in possession or appointing a permanent trustee, which hearing was fixed for June 29, 1938 (R. 11).

The statutory provision believed to sustain the jurisdiction of the District Court to entertain the Petition is Section 77B of the Federal Bankruptcy Act, as amended, USCA, Title 11, Section 207.

Pursuant to an order of June 27, 1938 the appellants herein, the owners of 50% of the stock and the holders of 95% of the indebtedness of the debtor corporation, intervened and filed their Petition in Intervention for a dismissal of the proceedings upon the grounds:

(a) That the Petition was not authorized by the Board of Directors of the debtor corporation; and

(b) That the Petition was not filed in good faith in that no basis exists for expecting a reorganization can be effected, and there is no probability of such reorganization being effected under Section 77B of the Bankruptcy Act, but was filed with the actual purpose of hindering and delaying the petitioners, R. H. White and Katherine King White, the sole creditors of the corporation, and that no feasible or prac-

ticable plan of reorganization could be proposed, and that any plan proposed would be speculative and impracticable; and the debtor's petition does not show honesty of purpose, motive or intent (R. 20-35).

The court had jurisdiction to permit the intervention and permit the interveners as creditors and stockholders to be heard upon the question of the permanent appointment of a trustee or trustees, and upon such other questions arising in the proceeding as the judge shall determine under and by virtue of USCA, Title 11, Section 207 (c) (11).

STATEMENT OF PLEADINGS, FACTS AND ORDERS ENTERED DISCLOSING THAT THIS COURT HAS JURISDICTION UPON APPEAL TO REVIEW THE ORDER IN QUESTION.

After full hearing upon debtor's Petition and the Petition of the Interveners to dismiss the same, the District Court on June 13, 1938 made and entered its final order (R. 43-50) that:

(1) Petition of Interveners herein that the Petition of the debtor herein be dismissed be denied;

(2) L. D. Gordon, Geo. B. Thatcher and E. J. Schrader be appointed trustees for the debtor and of its property and business, wherever situate, vested with exclusive possession and control thereof and the powers of trustees provided by Section 77B of the Bankruptcy Act and general powers not inconsistent with said Section 77B of a receiver in equity, subject to the control of the judge;

(3) The books of account of the debtor be closed as of July 15, 1938 and that the trustees take over and operate the business of the debtor on July 16, 1938.

On the 9th day of August, 1938, appellants presented to and filed in this court its Petition for leave to appeal from said order of July 13, 1938 (R. 64-79), which Petition was granted by order of this court on August 15, 1938 (R. 79, 80) and citation thereupon issued and was duly served (R. 80, 81).

The statutory provisions believed to sustain the jurisdiction of this court are Section 24 of the Bankruptcy Act, USCA, Title 11, Section 47.

STATEMENT OF THE CASE.

Agreement Between R. H. White and L. D. Gordon—Acquisition of Mining Property—Preliminary Financing.

In March, 1931, L. D. Gordon acquired a lease and option to purchase from the estate of one Silverino Penelas certain mining claims located in Nye County, Nevada and commonly called the "Leader" group (R. 90). In May of 1934 L. D. Gordon interested appellant, R. H. White, in the property. Gordon had theretofore paid upon the purchase price $1500.00, but had given considerable time to getting the property together, attention to the litigation which had been pending, and in supervising preliminary development. White advanced $12,000.00 for a one-quarter interest in the lease and option and later an additional $12,-000.00 for an additional one-quarter interest in the

property, the parties agreeing that Gordon's advances and services be given a value of $24,000.00 (R. 85).

On May 1, 1935 White advanced another $10,000.00. This was just prior to the execution of the agreement of May 1, 1935 between Gordon and White (R. 32, 85). White objected to continuing operations as a partnership and as a result the agreement of May 1, 1935 was entered into which provides in substance as follows:

> "Recites the acquisition by Gordon of the lease and option on the mining claims, the prior expenditure of monies by the parties in an effort to develop the mining premises, and the installation of mining machinery, etc., to the point where a milling plant might be deemed advisable.
>
> It was agreed therein that a corporation should be formed under the laws of Nevada, to be known as the Penelas Mining Company, with an authorized capital of 150,000 shares of the par value of $1.00 each, said authorized shares to be divided equally between the parties after delivery of 3,750 shares to the Penelas estate, unless said shares could be acquired for an additional $5,000.00.
>
> For the purpose of creating a corporate treasury, each of the parties agreed, as the occasion might require, to donate to the corporation equal amounts of their stockholdings not exceeding 75,000 shares in the aggregate, conditioned that the stock so donated should be used exclusively for corporate financing and as a bonus stock for monies theretofore or thereafter advanced by the parties in the furtherance of the mining project.

Provision was made for the first officers and Board of Directors, which were to be president and director, R. H. White, vice-president and director, L. D. Gordon, and secretary and director, Walter Rowson. Gordon was to be appointed manager of the corporation commencing August 1, 1935, and thereafter at the pleasure of the Board, and to receive a salary of $800.00 per month. R. H. White, as president, was to receive a salary of $250.00 per month. These salaries were those which had been previously paid by the mining partnership of Gordon and White.

White agreed that, in addition to the sum of $10,000.00 which he had already advanced on behalf of the corporate project, he would loan to the Penelas Mining Company, when formed, an additional $40,000.00 to be used primarily in the installation of an adequate milling plant on the premises and for the development of the mines. All of the money to be advanced by White to the corporate treasury was to be upon a budget estimate to be prepared by Gordon as manager, but not to exceed $20,000.00 in any one month. The monies advanced and to be advanced were to be evidenced by promissory notes executed by the Penelas Mining Company, bearing interest at 6% per annum, and to mature two and a half years after the respective dates upon which such advances were made. As to all monies so advanced, treasury stock was to be issued in equal amounts to each of the parties on the basis of one share of treasury stock for each dollar so advanced by the second party, but the treasury shares to be issued to Gordon were to be endorsed in blank and delivered and hypothecated to White as security for the repayment to him of the amount of the

corporate loans. Gordon's stock was to be released to him by White at such times and in such amounts as White shall be reimbursed for his advances upon the basis of one share of treasury stock for each $4.00 of corporate loans so repaid. No dividends were to be declared until the entire amount of all the White loans and accrued interest were repaid.

It was further agreed that if the aggregate of $50,000.00 so advanced by White was insufficient to accomplish the proposed corporate project and place the mining property on a productive basis, that White should have the prior right and option to make further advances not exceeding the sum of $25,000.00, in which event the balance of the 25,000 shares then remaining in the corporate treasury of the proposed Penelas Mining Company should be issued in equal amounts to Gordon and White on the basis of one share of treasury stock for each dollar so advanced by White, the same requirements and conditions as to the hypothecation of these shares to White and their subsequent release to apply. White was given a further right to advance such further and additional funds to the proposed corporation as might be necessary for the purpose of liquidating the balance of the purchase price then due or at any time thereafter unpaid so as to vest legal title to the property held under the lease and option in the proposed Penelas Mining Company, and upon making such advances White was entitled to receive from the Penelas Mining Company a first mortgage on all its mining claims as and for a corporation lien security for all monies theretofore advanced by White."

Organization of Penelas Mining Company and its Financing.

The Penelas Mining Company was organized in August, 1935, pursuant to the agreement of May 1, 1935 and in conformity therewith.

From time to time White advanced, or caused to be made, further advances until ultimately an aggregate of $140,000.00 was advanced by the Whites. For these advances promissory notes were from time to time issued by the Penelas Mining Company until they aggregated the principal sum of $140,000.00. As of the date of the filing of the Petition, there was due and owing to White and his wife, Katherine King White, on said promissory notes an aggregate of principal and interest of $159,978.24, and there was due to White on account of his salary as president of the company $5894.54 (R. 5). The balance due to other creditors, which was in the form of current accounts, amounted to only $7573.05 (R. 5, 22).

The White loans to the corporation up to the time of the commencement of operations of the mill in February, 1936, aggregated $115,000.00 in principal, and in March, 1936 the Whites made a further loan of $5000.00, and between May and August, 1937 made further loans aggregating $20,000.00 (Exhibit G, R. 337).

The Penelas Mining Company was not in a position to pay Mr. White (or Mrs. White), the sole creditors, the past due claims amounting to $140,000.00 and accrued interest of approximately $19,000.00 (R. 89).

The testimony discloses that of the purchase price of the Leader group, Gordon paid $1500.00, $23,500.00 was paid by or through Mr. and Mrs. White, and $20,-000.00 was paid by the company from apparent profits of operations during the years 1936 and 1937 (R. 138, 433, 434). White, however, between May and August, 1937 had to lend the company an additional $20,000.00, of which $15,000.00 was for further development of the mines and $5,000.00 to pay past due current obligations (R. 273, 282). Of the actual monies which went into the enterprise, Gordon furnished $1500.00, and Mr. White advanced, or caused to be advanced, $164,000.00.

Negotiations and Conversations Between Gordon and White Just Prior to Filing of the Petition.

In the month of April, 1938 and prior to the filing of the Petition, notes of the Penelas Mining Company in the principal sum of $102,000.00 being past due, demand for payment was made upon the Penelas Mining Company and at about the same time Mr. White made demand that there be transferred to his name as pledgee the 37,500 shares of Penelas Mining Company stock hypothecated to him by Gordon under the agreement of May 1, 1935. Demand for payment of the notes was refused, as was the request for the transfer of certificates of stock (R. 122, 123, 160, 165, 171, 172).

On May 2, 1938 Mr. Little, attorney for the Whites, wired Mr. Rowson, asking him to fix the earliest date for a conference with Gordon and Rowson on the Penelas situation (R. 469), to which Rowson replied

by telegram of May 3, 1938 that he and Gordon would be available on May 12th, to which Little replied that he expected to be in Reno May 12th (R. 470).

Following Little's arrival on May 11, 1938 (R. 263) negotiations were had between Mr. Gordon and Mr. Little which bore no fruit, but as a result of these negotiations and conversations Mr. Gordon went to Cleveland on May 19, 1938 and had conferences with Mr. White and Mr. Grover Higgins and Mr. Joseph Little, attorneys for Mr. White. The White interests proposed at these conferences that a power of attorney to vote the 37,500 hypothecated shares of Mr. Gordon be given to Mr. White, and that the Board of Directors of the Penelas Mining Company be enlarged so that Mr. White would have voting control, Mr. Gordon to remain as vice-president of the company, retain his title as general manager at a salary of $500.00 per month, reduced from $800.00 per month, and that Mr. White's salary should be entirely eliminated (R. 262, 263), and that someone else other than Mr. Gordon should be placed in charge of the operations of the Penelas company's mines and mill. These negotiations terminated without agreement (R. 143).

Assets—Ore Reserves, Plant and Equipment.

Ore Reserves.

At the time of the filing of the Petition and at the time of the hearing, the mine workings through which ore was extracted was the main working shaft which had reached a depth of 600 feet. There were no

workings below the 600 foot horizon. The ore reserves, according to Mr. Gordon, were 12,730 tons, all of which is above the 600 level (R. 90), of an average grade of $15.00 (R. 93) and having an average recovery value of 90% (R. 91). Mr. Gordon also gave the opinion that based upon other mines in Nevada and ore occurrences of a similar type and of similar veins, that the ore body in the Penelas should extend to the 1000 foot level (R. 91, 92), and that he would estimate that between the 600 foot level and the 1000 foot level there would be an estimated 30,000 tons (R. 93, 94). He believed the indebtedness to the Whites, with the interest, could be paid within three years (R. 90). His estimate that the extension of three years would suffice to pay off the White indebtedness and interest is based upon the ore reserves of 12,730 tons above the 600 foot level* plus an estimated 30,000 tons between the 600 foot level and the 1000 foot level, with an estimated mill-head value of $15.00 and an extraction of 90%, which would leave $13.50 per ton and a cost of $8.07, exclusive of interest and depletion, which would leave a profit of $5.50 per ton, or $7400.00 per month, and if this be maintained that the entire indebtedness could be taken care of in two years or less. That income taxes, however, have to be considered, as well as other taxes that might be levied (R. 112, 113).

Mr. E. J. Schrader, a mining engineer of experience and qualifications, a witness for the debtor, estimated 5000 tons of ore reserves reasonably to be

*The net value of the 12,730 ton ore reserves equals $63,750.00, before interest, income taxes, depreciation and depletion.

expected in the block between the 500 foot level and the 400 foot level, and between the 600 foot level and the 500 foot level 5000 tons (R. 212) with a mill-head value of probably $20.00 (R. 238). That he would not estimate anything below the 600 foot level because he could not see it. That as an engineer reporting on the property he would not make a statement that there is "possible" or "potential" ore of 30,000 tons of a grade of $15.00 in the Penelas mine below the 600 foot level. That he would not guess on something as wild as that. That he would predict, so far as the continuance of the vein, that in his opinion the vein would possibly continue to the 1000 foot level, but that he would not make any prediction as to the tonnage of ore because that would be a guess (R. 238, 239, 240). That if he were writing a report on the property for a possible purchaser that he would say that if this shoot on the 600 foot level goes down to the 1000 foot level a further depth of 400 feet and is no longer or wider than it is on the 600 foot level, then there are so many thousand tons in that block. That is a possibility (R. 240, 241).

Operating Record.

The operating record of the Penelas Mining Company since the mill commenced February 1, 1936 to May 1, 1938 (Exhibit G, R. 431), with a production of 34,444 tons from the mine and 2808 tons of dump ore, or a total of 37,252 tons, shows an average recovered value of $10.717 and gave a net profit, before depreciation and depletion (no income tax assessed) of $42,586.73, or $1.143 per ton of ore (R. 431). In the period from May 1, 1937 to April 30, 1938, a

twelve month period, the company operated six months at a loss and six months at a profit (Exhibit D, R. 289). The values in the mine and as they come to the mill are erratic (R. 173, 175).

After four years operations from June 1, 1934 to May 31, 1938, and with receipts from operations, investments and loans of $587,000.00 and the treatment of $37,250 tons of ore, the company ended up on May 31, 1938 with $1272.83 on hand, and in addition to which it had its quick assets in the inventory of approximately $6500.00 (Exhibit 20, R. 429; R. 205, 206).

Plant and Equipment.

The mill is a simple cyanide plant, with a capacity of about 1400 to 1450 tons per month, and with attendant diesel power, mine machinery and equipment, pumping plant, etc., all in good operating condition (R. 173, 174). Its depreciated value, as carried upon the books of the company, is $125,795.00 (R. 4). When the ores are exhausted there will be a very decided depreciation in the plant and when second hand mill equipment is sold it does not sell for very much (R. 174).

Opposition of Creditors and Stockholders to Plan of Reorganization.

The appellants, owners of 50% of the capital stock of the Penelas Mining Company and all of the indebtedness, were and are opposed to reorganization under the provisions of Section 77B of the Bankruptcy Act (Petition in Intervention, R. 21-27; R. 5, 264).

The Filing of the Petition was Never Authorized by the Board of Directors.

Attached to the Petition for Reorganization is what purports to be a certified copy of a resolution of the Board of Directors of the Penelas Mining Company, authorizing and directing the filing of the Petition for Reorganization by the corporation under the provisions of Section 77B of the Bankruptcy Act, as amended (R. 9-11). The certificate of the secretary, Walter Rowson, certifies

> "That at a regular meeting of the Board of Directors of said corporation, duly held on Monday, the 2nd day of May, 1938, pursuant to the company's By-Laws, *at which meeting a quorum of said Board was present and acting throughout,* the following resolutions were duly and regularly adopted:
>
> 'Resolved, that in the judgment of the Board of Directors it is desirable and for the best interest of Penelas Mining Company, its stockholders and creditors, that a Petition for the reorganization of this corporation be filed under the provisions of Section 77B of the Federal Bankruptcy Act, as amended; and further
>
> Resolved, that the form of Petition under said Section 77B presented to this meeting be and the same hereby is approved and adopted in all respects, and that the Vice-President or Secretary of this corporation be, and hereby are authorized and directed, for and in behalf of this corporation and in its corporate name to execute and verify a Petition substantially in such form and to cause the same to be filed with the United States District Court for the District of Nevada; and further

> Resolved, that the officers of this corporation be and they hereby are authorized to execute and file all petitions, schedules, lists and other papers, and to take any and all other action, that they deem necessary or proper in connection with said proceedings under Section 77B' " (R. 10, 11).

Mr. Rowson, as secretary of the company, further certified that the Petition of the debtor, verified by L. D. Gordon, vice president of said corporation, to which Petition the certificate is annexed as Exhibit A, is in the form referred to, and approved and adopted in the foregoing resolutions (R. 12).

Upon the hearing, Mr. Rowson testified that he prepared the minutes of what is here called the regular monthly meeting of the directors of the Penelas Mining Company. That they were dictated by him and were typed in his office by his secretary the end of May, 1938. That he thought May 2nd was the exact date but that his daily journal would show the exact date. That he was present in Reno on May 2, 1938, and that he recalls Mr. Gordon was present in Reno on the same date, but that he would have to look at his daily journal. That he keeps a written record in his office. He was asked to produce the record of that day, May 2, 1938, but it was never produced. He testified that the record would show whether Mr. Gordon was present or not. That his recollection is that he was, but it may have been May 1st or May 3rd, somewhere around that date (R. 120, 121). That he did not consider any notice necessary to be given to Mr. White because this was a regular meeting.

That although he knew Mr. White was president of the company, owned 50% of its stock, and his family owned the indebtedness of the company in the form of promissory notes in the sum of $140,000.00 about to mature, yet he did not think it necessary to give Mr. White notice of the meeting of May 2nd, which had for its purpose authorizing the filing of the Petition for reorganization of the Penelas Mining Company under 77B (R. 122). That inasmuch as it was a regular stated meeting, the by-laws providing that regular meetings should be held on the first Monday, in each month, he and Gordon just held the meeting and gave no notice (R. 122, 123). That this was upon the theory that Mr. White was not legally entitled to notice of a regular monthly meeting. That to have given White notice would have been an idle gesture, inasmuch as Mr. White was in Cleveland, had already retained counsel and made demand for payments of the company's past due promissory notes and interest and had evidenced in that way and by a cessation of his correspondence with Rowson that Mr. White's interests were antagonistic to those of the company (R. 122, 123). That Mr. White, in any event, would not have attended the regular meeting had he been notified. That he (Rowson) was actuated primarily by the fact that the by-laws provided for the holding of a regular monthly meeting on the first Monday of the month, and that no notice was required for a regular meeting (R. 123, 124). That he was familiar with the by-laws and that no hour was set in the by-laws for the holding of regular meetings. That Section 5 of Article III of the by-laws is as follows:

"The Board of Directors shall meet on the first Monday of every month at the office in Reno, Nevada, or whenever called together by the President upon notice given to each Director as hereinafter specified". That no other regular monthly meeting of the Board of Directors of the company had ever been held, as far as he knew (R. 124-126). That after the meeting had been held he did not advise Mr. White of the holding thereof, or of the resolution purported to be adopted, because in view of the demands made by Mr. White, and knowing that his interests were antagonistic to the company, he realized the necessity of holding the resolution, the effect of the resolution, in abeyance as long as possible so as not to disturb or adversely affect the negotiations which were then going forward between Mr. White and the company, with a view of amicable settlement of the controversy without resort to a proceeding for relief (R. 122, 123, 124, 125, 126). That his failure to so advise Mr. White was deliberate and intentional, acting as attorney for the company. That he considered that if Mr. White or his attorney believed that they had in mind resorting to a petition for relief it might adversely affect negotiations which were going forward with a view of settling the controversy without resort to the court (R. 126, 127). He described his position, or capacity, as being in a "triune" capacity. That he had acted as attorney for Mr. White in prior matters and in the incorporation of the Penelas Company; had acted for Mr. White and Mr. Gordon in the negotiations leading to the organization of the company, and was a director of the company (R. 127,

128). That he knew that Mr. White was president of the Penelas Mining Company, a director of it, owned half of its stock, and had pledged to him an additional 25%, and that he owned practically all of the debts of the company (R. 128).

Rowson's attention was called to that portion of the so-called resolution of May 2, 1938 which recites the presentation, adoption and approval in all respects of the Petition for Reorganization. He stated that the form was not now attached to the minutes because he ran out of copies and used the copy which was originally attached to the minutes to supply an extra copy to Mr. Thatcher as a matter of courtesy (R. 129). That the draft of the Petition was prepared by him upon the day of Mr. Gordon's return from his last conference with Mr. White, which he believed was in April. Gordon had wired him that their conference availed nothing and he immediately prepared his plans for the protection of the company and to provide a form of petition. That he procured figures from the bookkeeper, and with the exception of changes in figures, as the Petition was not filed until later, this was the form finally filed in court. That the *first draft* of the Petition was prepared after he received the wire from Mr. Gordon. That that was substantially its final form except for the difference in figures owing to the lapse of almost a month by the time the Petition was filed (R. 130). That the Petition was drafted at the time of Mr. Gordon's last visit to Cleveland *and that was when he prepared the first draft*. It was prepared with the expectation

of presenting it at the regular meeting of the directors (R. 131). He fixed the date as April 20, 1938, as he recalled, but he knew that he drafted it as a result of a wire that he received from Mr. Gordon. That Mr. Gordon was not in Cleveland, so far as he knew, at any time after that first occasion. That he informed Mr. Joseph Little, Mr. White's attorney, when he was in Reno a few days before Mr. Gordon went to Cleveland that unless an amicable arrangement could be concluded between White and Gordon that he would consider advising resort to the corporate organization act. *That when Mr. Little was in Reno he had not prepared any draft of the Petition.* That he considered and discussed it with him and did not feel that the company was sunk and that it had available means to which it could resort and mentioned specifically 77B of the corporate reorganization act. *That at that time he had not prepared any draft of a petition and no meeting had been held authorizing it* (R. 131, 132). He later asked that his testimony be corrected to show that the Petition was first drafted May 20, instead of April 20.

Mr. Thatcher thereupon asked Mr. Rowson to explain a resolution passed on the 2nd of May, which stated that the Petition was considered by the board and how he would reconcile it with his previous testimony of the morning. Mr. Rowson said he would have to refer to his journal before correcting the testimony on that point (R. 165, 166). Mr. Rowson never produced his journal or made any further correction of his testimony.

With reference to the so-called meeting of directors of May 2, 1938, the District Court said "I have heretofore indicated that this is a matter in which, if there are any defects in the matter of the Petition, so far as the meeting and action of the Board of Directors, can even now be corrected and ratified" (R. 37).

The evidence also shows that Mr. Gordon went to Cleveland not in April, but on May 19, 1938 for the conference with Mr. White and his attorneys concerning the Penelas (R. 258). On May 20, 1938 Gordon wired Rowson from Cleveland "I have done everything humanly possible but no sale Arrive eleven twenty tonight Please advise Helen" (Exhibit C, R. 165), to which Rowson replied by wire to Gordon at Denver "Have everything ready file petition Federal Court tomorrow and meet you Reno airport" (Exhibit B, R. 165).*

Conduct of Gordon and Rowson in Refusing to Transfer Pledged Shares.

Gordon testified that he had been advised by Rowson, secretary of the company, that the request had been made for transfer of the 37,500 pledged shares, and that Rowson had not transferred them, and that he, Gordon, concurred in that decision. That demands were made to him, or at least communicated to him, for the transfer of these pledged shares. After the first request he told Rowson as he understood the contract that it was never contemplated that these

*The first draft of the Petition was prepared by Rowson after he received the wire from Gordon (R. 130, supra 19).

shares be transferred. That they were additional security for White, and that the contract contained no provision for the transfer of the stock. He wanted White to have the stock as security but never contemplated that the shares would be transferred (R. 160, 161). That there was no reason that the shares be transferred, and that he so told Rowson. That after the second demand was made, Rowson wrote him that he had not transferred the stock. That he wouldn't call it an agreement between Captain Rowson and him not to transfer the stock. That Rowson was secretary of the company and attorney for the company, and he told him (Gordon) that he felt under the agreement of May 1, 1935 (R. 28) there was no reason for the stock to be transferred. That he concurred in the decision of Rowson not to transfer the shares. That his concurrence was largely as a stockholder of the corporation, and not as an officer, and as a matter of protection of his conceived to be interest, he refused to have the stock transferred. At that time he wasn't thinking about his duty as an officer. It wasn't his function to decide whether the stock should be transferred. This was the function of the secretary and attorney of the company, and Rowson was the secretary and attorney for the company. He never asked the advice of Rowson, as a matter of law, whether or not these certificates should be transferred, and then did ask him whether or not, in his opinion, the stock should be transferred, and Rowson said "No". He did not know, in giving that advice, whether Rowson was acting as attorney for him or for the company. He consulted Rowson

as attorney for the company, and Rowson was the man upon whom the demand was made. Rowson was secretary of the company and it was up to Rowson to make his decision. When asked if Rowson was his attorney at that time Gordon said "Well, yes and no" (R. 163, 164).

SPECIFICATIONS BY NUMBER OF THE ASSIGNMENT OF ERRORS RELIED UPON.

The following Assignment of Errors, namely, No. I (R. 75, 76), No. II (R. 76, 77, 78) and No. III (R. 78) are relied upon:

I.

THE DISTRICT COURT ERRED IN DENYING DEBTOR'S PETITION TO DISMISS FOR THE REASON THAT DEBTOR'S PETITION AND THE EVIDENCE ADDUCED UPON THE HEARING OF APPELLANTS' PETITION TO DISMISS ESTABLISHED THAT NO MEETING OF THE BOARD OF DIRECTORS OF PENELAS MINING COMPANY WAS EVER HELD AUTHORIZING THE FILING OF THE PETITION.

The record discloses that no meeting of the Board of Directors was held on May 2, 1938, or was ever held at any other time, authorizing the filing of the Petition for reorganization, and that the certificate of the secretary attached to the Petition certifying to the resolution was false, and that the record of the so-called meeting of the Board of Directors of May 2, 1938 was fabricated (Supra, pp. 14 to 20).

The evidence is clear, according to the admission on cross-examination of Rowson, that when Joseph Little was in Reno between May 11th and May 13th, no petition had been prepared and no meeting had

been held authorizing the filing of the Petition, and that no petition was ever prepared until after the failure of the negotiations in Cleveland and the exchange of telegrams between Gordon and Rowson on May 20, 1938 (Supra, pp. 14-20). No meeting of the board was subsequently held ratifying the action of Gordon and Rowson in filing the Petition. Indeed, such conduct cannot be ratified, and will not be condoned by a court of equity.

It must be recalled that the Petition in this case was first presented to the District Court for its approval. Attached to that Petition was a certificate of the secretary certifying to a resolution authorizing the filing of the Petition, and certifying that a meeting of the Board of Directors had been duly and regularly held, at which a quorum of the board was present and acting throughout, and that the authorizing resolution had been duly and regularly adopted. On the strength of this representation, the court approved the Petition. Had the court had before it the true facts, as developed upon the hearing, that no meeting had been held, the court would have been compelled to refuse to approve the Petition, and indeed would have had no jurisdiction to entertain it.

Under the Nevada law the management of the business and affairs of a corporation is vested in a board of directors, acting as such, and unless an act is authorized by such board, so acting, the act is not that of the corporation.

The Nevada Corporation Act of 1925, as amended, 1937, Section 31, provides:

"The business of every corporation shall be managed by a board of not less than three directors, or trustees, * * * such board of directors or trustees shall have full control over the affairs of the corporation.

* * * Unless the certificate or articles of incorporation, or an amendment thereof, shall provide for a lesser proportion, a majority of the board of directors of the corporation, *at a meeting duly assembled,* shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors or trustees. But the by-laws may provide that any action of a majority, although not at a regularly called meeting, and the record thereof, *if assented to in writing by all* of the other members of the board, shall always be as valid and effective in all respects as if passed by the board in regular meeting. * * *" (Italics ours.)

See

Yellow Jacket Mining Company v. Stevenson, 5 Nev. 224,

wherein it is held:

"The trustees represent the corporation only when assembled together and acting as a board."

Also

Hillyer v. Overman Silver Mining Company, 6 Nev. 51,

holding:

"The trustees can only bind the corporation under our laws when they are together as a board, acting as such."

The vice-president or the secretary of a corporation has no authority by reason of the holding of such office to file a petition in bankruptcy on behalf of a corporation, and the filing of such a petition without the proper authority of the Board of Directors, acting as such, confers no jurisdiction upon the Bankruptcy Court over such corporation.

In re Community Book Company, Inc., 10 Fed. (2d) 616 (D. C. Minn.),

wherein it is held:

" 'An officer of a corporation cannot admit inability to pay debts and signify the willingness of a corporation to be adjudged bankrupt, unless authorized by a resolution passed at a meeting of the stockholders or directors.' Collier on Bonkruptcy (13th Ed.) vol. 1, p. 180; In re Burbank (D.C.) 168 F. 719. An officer cannot file a petition for the voluntary bankruptcy of a corporation, unless authorized by the board of directors. Collier on Bankruptcy (13th Ed.) vol. 1, p. 200; Schaefer v. Scott, 40 App. Div. 438, 57 N.Y.S. 1035; In re Jefferson Casket Co. (D.C.) 182 F. 689; Regal Cleaners & Dyers, Inc. v. Merlis (C.C.A.) 274 F. 915, 48 Am. Bankr. Rep. 681; In re Southern Steel Co. (D.C.) 169 F. 702. * * *

In the instant case it is conceded that there was no meeting of the board of directors whatsoever, and no corporate action. The fact that the president may have spoken to other officers before taking the action which he did would not make the filing of the petition the act of the corporation. * * *

It is obvious that the petition in this case was ineffectual for any purpose. The court acquired

no jurisdiction. The adjudication must be vacated, and the petition dismissed."

Moreover, no meeting of the Board of Directors of this company could be held without notice. The applicable by-law of the company is "The Board of Directors shall meet on the first Monday of every month at the office in Reno, Nevada, or whenever called together by the President upon notice given to each Director as hereinafter specified. On written request of any Director, the Secretary shall call a special meeting of the board. At all meetings of the Directors a majority shall constitute a quorum for the transaction of business." No hour is fixed by the by-law, nor does the by-law provide that regular meetings may be held without notice. On the contrary, we think it is clearly indicated that both regular and special meetings of the Board of Directors require notice.

The general rule as to the holding of meetings by directors is stated in Corpus Juris, Vol. 14a, page 87, as follows:

> "Except in a few jurisdictions where the courts uphold acts done by the majority of the directors in the absence of and without notice to the minority, it is a rule that it is essential to the legality of a directors' meeting and the validity of acts done thereat either that all the directors shall be notified of the meeting, or that all shall be present, or that the absent directors shall waive notice. * * *"

Assignment No. II is summarized as follows:

II.

THE DISTRICT COURT ERRED IN DENYING THE PRAYER OF THE PETITION IN INTERVENTION TO DISMISS THE DEBTOR'S PETITION FOR THE REASON THAT THE DEBTOR'S PETITION WAS NOT FILED IN GOOD FAITH, IN THAT

(A) NO BASIS EXISTED FOR EXPECTING A REORGANIZATION AND THERE EXISTED NO PROBABILITY OF A REORGANIZATION UNDER SECTION 77B OF THE BANKRUPTCY ACT;

(B) THE DEBTOR'S PETITION WAS NOT FILED WITH THE ACTUAL PURPOSE OF EFFECTING A REORGANIZATION BUT FOR THE PURPOSE OF HINDERING AND DELAYING THE APPELLANTS, R. H. WHITE AND KATHERINE KING WHITE, THE SOLE CREDITORS OF THE DEBTOR CORPORATION;

(C) NO POSSIBLE, FEASIBLE OR PRACTICAL PLAN OF REORGANIZATION COULD BE PROPOSED AND ANY PLAN THAT MIGHT BE PROPOSED WOULD NECESSARILY BE SPECULATIVE AND IMPRACTICABLE;

(D) THE DEBTOR'S PETITION DID NOT SHOW HONESTY OF PURPOSE, MOTIVE AND INTENT.

A. No Basis Existed for Expecting a Reorganization and There Existed No Probability of a Reorganization Under Section 77B of the Bankruptcy Act.

The primary and only purpose of Section 77B of the Bankruptcy Act is to afford to distressed corporations a means whereby they may be reorganized by the submission to the Bankruptcy Court of a plan for such reorganization and the confirmation of such plan by the Bankruptcy Act. In order to effectuate any plan of reorganization, such corporation must secure the consent of two-thirds of each class of creditors and a majority of each class of its stockholders if their rights are affected by the plan, or, in lieu thereof, provision must be made for the protection of their in-

terest, claims or liens in the manner provided in sub-section (b), clause 5 of Section 77B. See Section 77B, sub-section (e), clause 1. Looking then to sub-section (b), clause 5, to determine the method of protection of such creditors and stockholders, it will be seen that such sub-section and clause provides that the plan must provide adequate protection for the realization by such creditors and stockholders of the value of their interest, claims or liens by one of the following methods:

(a) By the transfer or sale of the property subject thereto;

(b) By a sale of such interest and transfer of the interest, claims or liens to the proceeds of the sale;

(c) By appraisal and payment in cash of the value of such interest, claims or liens, or at the objecting creditors' and stockholders' election of securities allotted to such interest, claims or liens under the plan, if any are so allotted;

(d) By such method as will, in the opinion of the judge under and consistent with the circumstances of the particular case, equitably and fairly provide such protection.

See

Wayne United Gas Co. v. Owens Illinois Glass Co., 91 Fed. (2d) 827.

The leading case on the construction of the sub-sections of Section 77B hereinbefore mentioned, is

In re Murel Holding Corporation, 75 Fed. (2d) 941,

wherein a stay was granted of a mortgage foreclosure in the lower court and a plan submitted whereby the first mortgagee would be paid in full in a space of ten years. The mortgagee refused to consider the plan. An appeal was taken from the order of the court refusing to vacate the stay of the foreclosure action. On appeal the case was reversed and the court held:

> "The debtors' assumption is that under section 77B not only may a company effect a reorganization among its creditors, when two-thirds of each class consent, but that it may compel its unwilling creditors to accept a moratorium, though some of the classes refuse in toto. That was perhaps intended in sub-division (b) (5), 11 USCA § 207 (b) (5), but the power if it exists at all, is much hedged about. Normally it was expected that consents should be obtained. If they were not, the plan must 'provide adequate protection for the realization by them' the dissenting class, 'of the full value of their interest, claims, or liens'. This may be done in four ways: (a) The liens may be merely kept in statu quo, the reorganization not going so deep down into the title, so to say, but being confined to the equity. That is not this case. (b) The property may be sold free and clear and the liens attach to the proceeds. This was a not uncommon course in bankruptcy when the court was in possession. Regardless of whether it may now apply to a case where it is not, nothing of the sort is here proposed. (c) The value of the liens may be appraised and paid, or, if the objectors prefer, the same course might be taken with any new securities which shall be offered to them in reorganization. This again was not adopted here. (d) The last is not, properly

speaking, a 'method' at all; it merely gives power generally to the judge 'equitably and fairly' to 'provide such protection', that is, 'adequate protection', when the other methods are not chosen. It is this alone which the debtors here invoke. In construing so vague a grant, we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. It is plain that 'adequate protection' must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence."

It will be noted that the foregoing decision declares that if at any time the consent of two-thirds of any class of creditors is not to be required, such creditors must receive "a substitute of the most indubitable equivalence", "adequate protection", "must be completely compensatory", and that "payment ten years hence is not generally the equivalent of payment now".

The principles of the foregoing case have been twice passed upon and upheld in this Circuit where this court has likewise held that any such plan must be completely compensatory. These cases are:

Francisco Building Corporation v. Battson, 83 Fed. (2d) 93,

wherein this court held as follows:

"The petitioner contended in the trial court that it was unnecessary to secure the consent of the bondholders and creditors because it alleged that its proposal came under section 77B of the Bankruptcy Act, subd. (b), Cl. (5), subcl. (d), 11 U.S.C.A. § 207 (b), (5), (d), as follows: 'By such method (of reorganization) as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection (for creditors).' This subsection of section 77B has been construed by the Circuit Court of Appeals for the Second Circuit, In re Murel Holding Corporation, 75 F. (2d) 941, 942, in an opinion written by Judge Learned Hand, where it is stated that it is plain that adequate protection as therein used 'must be completely compensatory'. See also, to the same effect, decision by the same court, In re Coney Island Hotel Corporation, 76 F. (2d) 126. The holders of about 92.24 per cent. of the outstanding bonds objected to the proposed form of reorganization and claimed that the proposed plan would reduce the claims of the bondholders by $312,260.12. The trial court sustained their objections to the proposed plan for reorganization.

An appeal is taken from that order.

(1) It is too obvious to require discussion that there is no abuse of discretion in refusing to approve the proposed plan of reorganization. In re Murel Holding Corporation, supra; In re Coney Island Hotel Corporation, supra."

and in the later case of

Security First National Bank v. Rindge Land & Navigation Co., 85 Fed. (2d) 557,

wherein this court stated:

"It is the Debtor's position on this appeal that the claim of Pacific States as a nonassenting bondholder is provided to be paid in full under subdivision (e) or is adequately protected under subdivision (b), clause (5), by the payment to Pacific States of the consideration paid by it in acquiring the bonds, that is, 40 per cent. of the face value of the bonds.

We cannot agree with this contention. *The legal value or property right in an obligation is the right to recover from the maker to the entire extent of his promise to pay.* The consideration given for a security by the holder thereof is immaterial. Wade v. Chicago, Springfield & St. Louis R. C., 149 U. S. 327, 343, 13 S. Ct. 892, 37 L. Ed. 755; In re Tennessee Publishing Co. (C.C.A. 6) 81 F. (2d) 463, 466. Manifestly, therefore, a plan of reorganization which gives bondholders only 40 per cent. of the face value of their holdings does not make 'provision for the payment of their claims in cash in full.'

It is equally well settled that a plan of reorganization does not 'provide adequate protection' to creditors, within the meaning of subdivision (b), clause (5), when it gives such creditors only a fraction of the face value of their holdings. In a recent proceeding under section 77B which came before this court, the contention was urged that certain bondholders received 'adequate protection' by acquiring bonds of about half the face value of their former holdings. In rejecting the argument,

> this court held that the protection for creditors specified in the act must be 'completely compensatory'. Francisco Bldg. Corp. v. Battson (C.C.A. 9) 83 F. (2d) 93. A like conclusion was announced by the Sixth Circuit in Re Tennessee Publishing Co., supra." (Italics ours.)

From the foregoing authorities it will be seen that before any corporation can secure a reorganization under Section 77B it must have the consent of at least two-thirds of its creditors and a majority of its stockholders, unless it possesses sufficient assets to adequately protect for the realization by such creditors and stockholders their interest and claims. Such adequate protection is held to mean such as is completely compensatory. The corporation must have sufficient assets or backing to be able to liquidate the claims of the dissenting stockholders and creditors.

Here there existed but one class of creditors and one class of stockholders. The appellants hold all of the indebtedness of the company and own 50% of its common stock. Prior to the filing of the Petition, Gordon, vice-president and director, and Rowson, secretary and director, knew that the appellants would not consent to any plan of reorganization under 77B, and for this reason concealed from White their pretended action in adopting the resolution authorizing the proceeding and intentionally withheld from him any knowledge of it (R. 127). This opposition was continued by the filing of the petition for dismissal (R. 21-27) and upon the hearing (R. 264). It is therefore impossible to secure the consent of

either creditors or stockholders necessary to effectuate any plan of reorganization.

The realizable assets of the company are its known ore reserves, or those which are reasonably indicated, of approximately $63,000.00, and its mill, plant and equipment located seventy miles from a railroad, which, when the ores are exhausted, will suffer a decided depreciation because second-hand mill equipment does not sell for very much (R. 174). No consideration can be given to hoped-for ores below the 600-foot horizon. Because of insufficiency of assets, it is impossible for the debtor corporation to adequately provide any plan which would be completely compensatory to the creditors.

Inasmuch as it was known at the time the debtor's Petition was filed that there existed no probability of a reorganization under Section 77B, or any basis for expecting that such reorganization could be effected, the Petition was wholly lacking in good faith and should have been dismissed. See

> *Manati Sugar Co. v. Mock,* 75 Fed. (2d) 284 C. C. A. 2nd, 1935),

wherein the court, at page 285, said:

> "To conclude that a petition is filed in good faith, there should be a showing, found within it, of a need for reorganization. The good-faith provision of the statute is not satisfied merely by honesty and good intentions. There must be a showing that the petitioners have a basis for expecting that a reorganization can be effected. *Where the object is reorganization, rather than liquidation, the petitioner should furnish some*

assurance, by allegations at least, that they reasonably expect a fairly general support for their proposed plan or promised plan. Otherwise there would be little to be expected in the undertaking of assuming responsibility for a reorganization.

On the other hand, the honesty and integrity of the petition may not be questioned by the mere fact that petitioners' claims represent a small percentage of the claims against the debtor, if the aggregate of the claims is sufficient to come within the statutory requirements that Congress has determined to be sufficient to invoke relief under the act. The Courts may not adopt any other test. *But it must appear that there is reasonable probability that a reorganization will be effected.* In other words, the question presented is whether there may be reasonably applied to the debtor some feasible and practicable plan of reorganization. If not, there is no occasion to invoke the benefits of the act." (Italics ours.)

Also see

In re Cosgrave, 10 Fed. Supp. 672,

in which the court, at page 673, stated:

"The question of good faith is one which the court is obliged to consider—'good faith' means that the proceeding is brought by a person within the contemplation of the act, and under circumstances which warrant the assumption that some form of fair compromise may be worked out with creditor interests. The provisions were never intended to merely stay the hands of creditors, and leave unmolested the property in possession of the debtors who might continue to derive the income therefrom."

B. The Debtor's Petition Was Not Filed With the Actual Purpose of Effecting a Reorganization, But For the Purpose of Hindering and Delaying the Sole Creditor of the Debtor Corporation.

As heretofore pointed out, the debtor corporation and Gordon and Rowson, as directors and officers, knew that no reorganization could be effected under the provisions of Section 77B of the Bankruptcy Act because they could not receive the necessary consent of stockholders or creditors and that the value of the assets was insufficient to adequately compensate or protect the creditors to the full extent of their indebtedness. Gordon testified upon the hearing that he believed the indebtedness to the Whites, with interest, could be paid within three years (R. 90) and this was based upon ore reserves of 12,730 tons above the 600-foot level and a hoped-for 30,000 tons between the 600-foot level and the 1,000-foot level, with an estimated millhead of $15.00 and an extraction of 90% and a cost of $8.07, exclusive of depletion (R. 90-112-113). Vice-president Gordon was receiving a salary of $800.00 a month and had been in charge of the management of the property. The indebtedness to appellants to June 1, 1938 was $140,000.00 in principal and $19,979.24 in interest. Appellants had demanded the transfer to Mr. White, as pledgee, of the stock hypothecated to him by Mr. Gordon under the contract of May 1, 1935 and this demand was refused by the officers of the corporation in face of Section 18 of the General Corporation Law of Nevada of 1925, as amended, 1937, which provided:

> "* * * The delivery of a certificate of stock in a corporation to a bona fide purchaser or pledgee, for value, together with a written trans-

> fer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to *transfer the title against all parties* except the corporation. No transfer of stock shall be valid against the corporation until it shall have been registered upon the books of the corporation." (Nevada Compiled Laws, 1929 Pocket Supplement, page 147.) (Italics ours.)

In view of these facts and the conduct of Gordon and his attorney, director Rowson, in concealing from White their plans for the filing of a reorganization proceeding and in refusing to transfer the shares, the conclusion is irresistible that the object of directors Gordon and Rowson in filing the Petition was not to effect a reorganization but to continue themselves in control as long as possible and hinder and delay the appellants from collecting the indebtedness due them.

The authorities are uniform that the provisions of Section 77B are not available for the purpose simply of harassing and hindering a creditor from the collection of his debts or for mere delay. See

> *R. L. Witters Associates v. Ebsary Gypsum Co.,* 93 Fed. (2d) 746 (C. C. A. 5th, 1938),

where the court, at page 749, stated:

> "What then is meant by the statutory requirement that the petition be filed in 'good faith' is that it must appear that the petition, whether an involuntary one, filed by creditors against the debtor, or a voluntary one, filed by the debtor himself, was filed not for the purpose of harassing the debtor, or of hindering and delaying creditors, Re Piccadilly Realty Co., 7 Cir.,

78 F. (2d) 257, but with the purpose and reasonable belief that under the processes provided for by section 77B, the debtor is in a position to conform to the requirements and to obtain the benefits of the statute."

Also

First National Bank of Wellston v. Conway Road Estates Co., 94 Fed. (2d) 736,

wherein the court stated:

"Considering the act itself and all these decisions it is apparent that it is the duty of the District Court to bear in mind the purpose and function of 77B at every step of the proceedings; and whenever it appears that rehabilitation of the debtor is impracticable or that injunctive relief is not sought in good faith the court in the exercise of a sound discretion should refuse the debtor further aid in harassing lienholders."

C. No Possible, Feasible or Practical Plan of Reorganization Could Be Proposed and Any Plan that Might Be Proposed Would Necessarily Be Speculative and Impracticable.

The clear purpose of the debtor corporation, or rather its two directors, vice-president and secretary, in filing the petition was, and is, the hope and expectation that through 77B proceedings the property could continue to operate either through the debtor corporation or through trustees, in the hope that the so-called potential ores could be discovered and developed in the meantime, pending the proceedings, in the debtor's mining claims below the 600 foot level, from which there had been no works extended and no development work done. Rowson has no interest in the corporation as a stockholder, or otherwise. Gordon's interest is that of a stockholder. Continued

depletion of present ore reserves and the expenditure of the moneys therefrom in a development plan below the 600 foot level permits him to speculate at the hazard of the creditors, the appellants here.

Compelling a creditor to stand by and see the assets of a corporation depleted in a speculative enterprise, to which he has not consented, is not within the contemplation of 77B of the Bankruptcy Act. See

> *Tennessee Publishing Co. v. American National Bank,* 81 L. Ed. 13,

where the Supreme Court of the United States held as follows:

> "Nor do we need to inquire as to the precise limits of the concept of 'good faith' as required by § 77B. Whatever these limits may be, the statute clearly contemplates the submission of a plan of reorganization which admits of being confirmed as 'fair and equitable' and as 'feasible'. However honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impracticable schemes for resuscitation. Subsection (f) of § 77B provides for the confirmation of a plan only if the District Judge is satisfied '(1) that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible.' These are prime conditions. Unless the District Judge finds that the plan has these qualities he need go no further. Unless he so finds, he has no authority to proceed."

and the case of

> *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* Supra,

where a petition for reorganization was dismissed where the debtor could not secure a consent of two-thirds of the first mortgage holders, and the court found that the total value of all the indebtedness was not sufficient to discharge the mortgage indebtedness. The court held:

> "As the property of the corporation belongs in effect to its first mortgage bondholders with no equity for stockholders or junior encumbrancers, it is perfectly clear that the effect of the plan proposed is to turn over the control of the corporate property to those who have no real interest in it and to make it possible for them, through the payment of salaries to corporate officers and interest upon the debentures to be issued to themselves in lieu of notes secured by the second mortgage bond, to deplete the assets to the prejudice of the owners of the first mortgage bonds who are the real owners of the property and entitled thereto. * * * Under the terms of the proposed plan, therefore, not only can operating expenses and the interest on the income debentures, held by those who will control the company through stock ownership, be paid out of income realized from operation resulting in the depletion of wasting assets, but the note given under the plan of reorganization can also be thus paid. With the control of the company in the hands of those who have no real interest in its assets and who could be interested in continuing its operation only for the purpose of getting everything possible from it in the way of operating salaries and interest payments, and with no adequate check against these, the position of the first mortgage bondholders would be most precarious. They might reasonably expect

that at the maturity of the bonds they would find themselves 'holding the bag', with their security largely exhausted through the operations of the company, the income from which would have gone into the payment of salaries, the note given for reorganization purposes, and the interest on the income debentures."

In

Provident Mut. Life Ins. Co. v. University Ev. L. Church, 90 Fed. (2d) 992, 995,

this court held:

"Good faith is more than bona fide intentions. The petition in order to satisfy this requirement must show some possibility of successful reorganization. In Manati Sugar Co. v. Mock, 75 F. (2d) 284, 285, the Circuit Court of Appeals for the Second Circuit said: 'The good-faith provision of the statute is not satisfied merely by honesty and good intentions. There must be a showing that the petitioners have a basis for expecting that a reorganization can be effected.'

The Sixth Circuit Court of Appeals expressed a like conclusion in Re Tennessee Publishing Co. (C. C. A.) 81 F. (2d) 463, 466: 'We think it clear, however, in agreement with the Second Circuit, that something more than sincerity of intention was intended. The purpose of the statute is to relieve distressed debtor corporations and to provide the mechanics for reorganization where reasonable expectation of continued useful existence may be fairly entertained. This being so, something more must be demonstrated by the debtor than mere honesty or sincerity of purpose. If not, then the way is open to the exploitation of every involved corporation by visionaries whose illusory and optimistic imagi-

nations outrun their business judgments, and the interest of every legitimate creditor is at the mercy of debtors whose sole hope of financial salvation is an abiding faith in miracles.'

This case was affirmed by the United States Supreme Court on another ground. Tennessee Pub. Co. v. American Nat. Bank, 299 U. S. 18, 57 S. Ct. 85, 81 L. Ed.......... In the course of the opinion Chief Justice Hughes stated (299 U. S. 18, 22, 57 S. Ct. 85, 87, 81 L. Ed.........): 'Nor do we need to inquire as to the precise limits of the concept of "good faith" as required by section 77B. Whatever these limits may be, the statute clearly contemplates the submission of a plan of reorganization which admits of being confirmed as "fair and equitable" and as "feasible". However honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impracticable schemes for resuscitation.' "

D. The Debtor's Petition Did Not Show Honesty of Purpose, Motive and Intent.

Since the enactment of Section 77B of the Bankruptcy Act, the decisions have been numerous upon the question of "good faith". The position taken by the courts is well stated in the case of

Platt v. Schmitt, 87 Fed. (2d) 437 (C. C. A. 8th, 1937),

where it is said at page 440:

"No comprehensive definition of 'good faith' should be attempted, but the circumstances of each case must control according to long-settled principles of law and equity. The purpose and spirit of the act are to be found in the circumstances of its enactment and in all its terms con-

sidered together. There is a duty in the courts to see that provisions of the act are not abused and that its privileges are extended only to those who are within the contemplation of the act. But the court must determine in each particular case, by exercise of judicial discretion in the light of all the facts, whether the debtor has filed his petition in good faith. In re North Kenmore Bldg. Corpn. (C.C.A. 7) 81 F. (2d) 656, 657; In re Collins, supra; In re Fullagar, supra; In re Philadelphia Rapid Transit Company (D.C.) 8 F. Supp. 51, affirmed, S. Davis Wilson v. Philadelphia Rapid Transit Company (C.C.A.) 73 F. (2d) 1022; In re Cosgrave (D.C.) 10 F. Supp. 672; In re Francfair, Inc. (D.C.) 13 F. Supp. 513."

All of these cases upon the subject disclose an apparent reluctance to confine the scope of the term within definite limits; however, from the definitions it would seem clear that there must be at least honesty of purpose, motive and intent in commencing a proceeding under said Section. See 49 *Har. L. Rev.* 1123; *In Re South Coast Company,* 8 Fed. Supp. 43 (D. C. Dela., 1934); *In Re Flamingo Hotel Company* (D. C. Ill., 1934; *C. C. H. Bktcy Ser. Dec.,* Vol. 3007. In the *South Coast Company* case the court said, page 44:

> "The 'good faith' requirement of this section is a requirement that the Petition shall be filed with the actual intent and purpose to use Section 77B to effect a plan of reorganization."

Throughout the proceedings in the lower court, it appeared from the evidence that the proceedings were not in good faith, and the motives and intent of the directors were not in good faith and with a bona fide

purpose of effecting a plan of reorganization, but for the purpose of hindering, delaying and harassing the creditors and continuing in control Gordon and Rowson. The so-called meeting of directors of May 2, 1938 was never held. Notice of the actions of directors Gordon and Rowson were deliberately and intentionally withheld and concealed from White, president of the company and one of its directors, who, with his family, owned 50% of the stock of the company and were its sole creditors. Rowson, in refusing to transfer the stock, pretends to act upon his own advice as attorney for the company, when in fact he was attorney for Gordon. On his own initiative he proceeds to construe the contract of May 1, 1935, as not permitting the transfer, and in the same breath both he and Gordon say that Gordon never directed him not to transfer the shares. He and Gordon conferred and corresponded with reference to the transfer of the hypothecated shares.

There can be no question but that Gordon and Rowson confederated and conspired deliberately and intentionally to withhold the transfer of these shares to the end that Gordon's control of the company could be perpetuated. There is here not only a lack of good faith, but clear and conclusive evidence of bad faith in the filing of the Petition in this cause.

We desire to call the court's attention, in closing, to the fact that no answer was ever filed to the allegations contained in the Petition in Intervention and there was no pleading filed deying them in whole or in part. For such failure to answer, the very clear and specific allegations contained in paragraphs V, VI, VII, VIII, IX, X and XI stand admitted (R. 23-27).

APPELLANTS' BRIEF ON MOTION TO DISMISS.

The appellee heretofore filed herein a motion to dismiss this appeal. Typewritten briefs were filed herein by both appellant and appellee thereon. On January 30, 1939, this court made an Order that the Order of submission of the Motion to Dismiss be vacated and that all questions arising on the motion and on the merits be briefed and argued together. Following is set forth appellants' position on such Motion to Dismiss.

STATEMENT OF FACTS ON MOTION TO DISMISS.

On June 1, 1938, the Penelas Mining Company, a mining corporation, filed a Petition for Debtor's Relief signed by its Vice-President, L. D. Gordon, under Section 77B of the Bankruptcy Act (R. 1 to 11). On the same day the District Court for the District of Nevada made and entered an Order approving the Debtor's Petition and continuing the Debtor in possession of its property and ordering that a hearing be held upon the question of permanently continuing the Debtor in possession, or appointing a permanent trustee, for the 29th of June, 1938 (R. 11-14). Prior to such hearing, the Appellants here filed a Petition for Leave to Intervene in the proceeding (R. 14-19), which Petition was, on June 27, 1938, granted (R. 19-20) and Appellants then filed a Petition in Intervention which prayed that the Debtor's Petition be dismissed, but that if such Petition be permitted to stand that the court appoint independent trustees to take charge of the Debtor's property (R. 19-34; 20-36). On the 29th of June, 1938, Appellants' intervening

Petition came on for hearing, as well as the hearing on the question of continuing the Debtor in possession of its property. The hearing lasted until July 9, 1938, at which time the District Court gave an opinion orally upon the matter (R. 37-42). Subsequent to the statement of that opinion by the court, a colloquy occurred between various counsel and the court (R. 39-42). In its oral opinion, among other things, the District Court stated:

> "I am impressed, however, that in the condition in which this property now is, and in view of the fact there are but two parties who have an ultimate interest therein, that this is a procedure which apparently would afford a solution.
>
> I will sustain the Petition and grant the Petition, but under the conditions that the property be placed in the hands of a Board of three trustees. These trustees will be Mr. White, Mr. Gordon and Mr. Schrader * * *" (R. 37).
>
> "I am not, at this time, going to put any restrictions on the Board of Trustees. I will leave it to them to get together for the purpose of carrying out the real purpose of the corporation. As I before indicated, there are two parties that have an interest in a mining property. This property has been, to some extent, developed * * *" (R. 38).
>
> "The only suggestion I am going to make to the trustees is that the fundamental proposition to be carried out is the economical development of this property, with a view of payment to Mr. White in full of the money which he has advanced for development and to Mr. Gordon for his time and labor and devotion to the development of the property, and in these conferences I do not know

of anything better to offer, in mining particularly, where interests both of those who advance the money for development and those who are interested otherwise in the property are concerned, the Golden Rule will help out.

With best wishes and success of the administration, that will be the order of the Court at this time. The Petition is approved and the matter is referred to the three trustees named * * *" (R. 39).

Following these statements, a question was raised by counsel as to the substitution for Mr. White of Mr. Thatcher as one of the trustees. In response to this suggestion, the court stated:

"I was in hopes that the two parties in interest would retain the position, but if for any reason they do not wish to do that, would have the right to suggest some one in their stead. If that is the desire, I appoint Mr. Thatcher" (R. 40).

Also, in the colloquy that followed, counsel for the Debtor raised the question of the continuance in charge of operation of the then manager, Mr. Gordon, and stated:

"MR. ROWSON. Will that be made part of the formal order?" (R. 41).

The court then stated:

"No, I stated I would make no restrictions whatever at this time. If there is any reason for so doing later, on a showing, the Court will consider that matter. The less restrictions the Court puts in advance on trustees, in my experience, the

better. Sometimes something develops that makes it incumbent upon the Court to change that point of view" (R. 41).

The Clerk of the Court evidently presumed that the opinion of the court was meant as an Order in the proceeding and later (as of July 9, 1938) made a Minute Order (R. 42-43). No Notice of the entry of this Minute Order was ever given to counsel for Appellants and they had no knowledge that such Minute Order had been entered (see Affidavit of O. E. Benham, Clerk, filed herein).

On the 13th of June, 1938, there was presented by Appellants to the District Court the formal order from which this appeal is taken (R. 43-49). This Order provides:

1. That Interveners' prayer for dismissal of Petition be denied;

2. That L. D. Gordon, Geo. B. Thatcher and E. J. Schrader be appointed trustees of the Debtor's estate, and describing the properties which are to be subject to the trusteeship;

3. Authorizing the trustees to take possession of the assets of the Debtor and providing their powers;

4. Further enumerating powers of the trustees;

5. Ordering the Debtor to deliver its property to the trustees;

6. Providing for the closing of the books of the Debtor as of July 15, 1938, and opening new books of account by the trustees on July 16, 1938;

7. Authorizing the trustees to hold possession of the property of the debtor until further order of the court;

8. Authorizing the trustees to apply for instructions as to their duties;

9. Ordering the trustees to file schedules of the assets turned over to them and to file reports;

10. Providing the trustees shall qualify upon executing a $5000 bond each.

It is from this Order that Appellants have appealed and filed their Petition for Appeal on August 9, 1938, which appeal was allowed and citation issued August 15, 1938.

From the Points and Authorities heretofore filed by Appellee it would appear to be the contention of Appellee that the oral opinion of the court given on July 9, 1938, constituted the rendering of a final order and that the Minute Order thereafter entered by the Clerk of the District Court constituted the entry of such Order, and that inasmuch as subsection (c) of Section 24 of the Bankruptcy Act provides

> "All appeals under this section shall be taken within thirty days after the judgment or order or other matter complained of has been rendered and entered."

that Appellants should have appealed from the oral opinion of the court given July 9, 1938, and as there are thirty-one days in July that Appellants were, therefore, one day late in perfecting their appeal.

It is the contention of Appellants:

1. That if the oral opinion of the court given on July 9, 1938, can be considered an Order of the Court, then the same was so amended, changed and enlarged by the Order of the District Court on July 13, 1938, that such latter Order must be considered the final Order from which the appeal must be taken.

2. That the oral opinion of the court was not considered by the District Court to constitute a final Order and should, therefore, not be so considered by this court.

3. That the oral opinion of July 9, 1938, is merely an opinion and is, in itself, not a final appealable order.

1. The District Court's Order of July 13, 1938, Must Be Considered as the Final Order From Which the Appeal Should Be Taken.

In the case at bar an examination of the oral opinion of the District Judge will disclose that no direction was given by the District Judge to the Clerk to enter any Minute Order, nor does the Minute Order conform to the language of the Judge in his oral opinion but apparently was entered upon the assumption that such an Order was intended. That the District Court did not consider its oral opinion to constitute a final Order in the matter is amply evidenced by the fact that six days later the Judge signed a formal order covering all of the matters stated in his opinion and in addition thereto, fixed specifically the duties and powers of the trustees of the Debtor. In this situation, if the original opinion can be considered an

Order, the Order of July 13, 1938, must be considered as a vacation of the previous Order and the entry of a new Order which was intended to be the final Order disposing of the issues raised on the hearing.

A very similar situation was presented in the case of

Union Guardian Trust Co. v. Jastromb (C. C. A. 6th Circuit), 47 Fed. (2d) 689,

wherein the bankruptcy proceeding petitions for reclamation had been filed. On March *7, 1930,* the District Judge filed an opinion which decided the case on the merits and concluded:

> " 'In view of these conclusions the reclamation petition of the Union Trust Co. will be denied. The reclamation petitions of * * * Jastromb and Testori will be granted, and orders may be entered in accordance with this memorandum.' "

On the same day the Clerk entered on the journal the Order

> " 'That the said petition of the Union Trust Co. be and the same is hereby denied, and the said petitions of * * * Jastromb and Testori be and the same are hereby granted, for the reasons set forth in the written opinion this day filed herein.' "

Counsel for the Union Trust Company, not knowing that the Order had been entered by the Clerk, drafted a more detailed Order containing certain recitals and submitted it to the Judge for signature. After some controversy and revision, the Judge on March *18th,* signed an Order which, after some recitals, was in substantially the same language as the Order of March

7th. On April 15th the Union Trust Company perfected an appeal from the Order of March 18th, relating to the Jastromb automobile and on the same day perfected the Testori appeal. On a Motion to Dismiss the appeals, the court held as follows:

> "The order of March 7 entered on the journal was a valid order from which appeal could have been taken. It did not need the judge's signature. Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co. (C.C.A. 6) 267 F. 945. It is not necessary to decide whether its taking effect was postponed by any failure to give the formal notice contemplated by Equity Rule 4 (28 USCA § 723). On March 18, this order was within the control of the court, which had full power to vacate or modify it. The order of March 18 did not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject-matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order. We have so treated such a situation upon other similar motions not reported, and, under the facts here appearing, we think this is the right conclusion."

As in the foregoing case, the District Court in the case at bar, the term not having expired, had within its control its oral opinion or Order of July 9th, and had full power to vacate or modify it. Inasmuch as the District Court's Order of July 13th not only covered the same subject matter as the oral opinion of July 9th but additional subject matter, it is clear that it was intended to supersede the oral opinion and any order entered pursuant thereto. Such being the case,

the Order of July 13th is the only final Order from which an appeal could be taken in this matter and the appeal, being taken within the thirty-day period, is therefore timely.

It may be urged on behalf of Appellee that *Union Trust Co. v. Jastromb, supra,* is contrary to the case of *Mutual Building and Loan Association v. King* (C. C. A. 9th Circuit), 83 Fed. (2d) 798, cited in its Points and Authorities heretofore filed herein. This case and the instant case are clearly distinguishable. In *Mutual Building and Loan Association v. King, supra,* the right to appeal had been lost by the lapse of time before the subsequent order or judgment had been made or entered. The court's control over its previous Order had lapsed and the holding in the *Mutual Building and Loan Association* case is simply that the right of appeal could not be revived by a subsequent entry of the same order. In the case at bar the District Court had full control over the matters set forth in its oral opinion of July 9, 1938, when it superseded the same by its Order of July 13, 1938.

2. The Oral Opinion of the District Court Was Not Considered by the Court to Constitute a Final Order and Should, Therefore, Not Be So Considered by this Court.

While in the language used by the District Court in its oral opinion there is contained some language which might be susceptible to a construction that it intended the same as some sort of an order, yet the District Court did not so consider it for the reason that it thereafter entered the Order of July 13, 1938, covering the same subject matter.

A somewhat similar situation is contained in the case of

Oliver v. Garlick, C. C. A. 5th Circuit, 2 Fed. (2d) 132,

wherein the court held:

> "These were three claims in the matter of Tennille Yarn Mills, bankrupt, presented as secured debts, all of which were disallowed by the referee. On objection, the District Judge reversed the ruling of the referee as to the claims of G. H. Williams and I. J. Gay. A paper, subsequently styled by the judge an opinion, so holding, was filed on the 28th of September, 1923. On the 15th day of December, final orders were entered in each of said claims, reversing the referee as to the claims of Williams and Gay, and affirming him as to the claim of the Bank of Sparta.
>
> A motion was made in this court to dismiss the Williams and Gay appeals, as not taken within the time prescribed by the statute from the 28th of September. As the judge treated said writing of September 28th as an opinion, granted subsequently final judgments which are appealed from in this matter, and as we are affirming said judgments, we accept the judge's construction of said writing of September 28th, and treat the appeals as properly taken from the final judgments of December 15th, and the motion to dismiss the appeals in the Williams and Gay cases is overruled."

As in the foregoing case, the District Court here clearly construed its oral opinion as merely an opinion and not a final order and therefore its construction should be followed by this court.

3. The Oral Opinion of the District Court of July 9, 1938, Does Not Constitute a Final Order But Is Merely the Opinion Upon Which an Order Was to Be Based.

If the oral opinion of the District Court is simply considered as an opinion upon which an Order was thereafter intended to be based, or if further matters were to be disposed of by the final Order, then there exists no basis for Appellee's Motion. An examination of the language of the court's oral opinion, taken as a whole, demonstrates that it was clearly not intended as a final Order. It does not directly deny Intervener's Petition to Dismiss the Debtor's Petition but leaves such denial simply to inference from the opinion of the court as to what should be done as to the property. It stated:

> "I *will* sustain the Petition and grant the Petition (referring to the Debtor's Petition for Relief) but under the conditions that the property be placed in a board of three trustees. These trustees *will* be Mr. White, Mr. Gordon and Mr. Schrader." (Italics ours.)

The Intervener's Petition was never expressly denied until the entry of the Order of July 13, 1938. The court did not directly order the property of the Debtor turned over to the three trustees nor did it directly by such opinion order the appointment of any persons as trustees. It did not define the power of any trustees that might be appointed, and it did not provide therein for their operation of the mining properties of the Debtor, but simply stated:

> "I *will* leave it to them to get together for the purpose of carrying out the real purpose of the corporation." (Italics ours.)

In the colloquy following the giving of the opinion, the court states:

> "I was in hopes that the two parties in interest would retain the position but if for any reason they do not wish to do that, would have the right to suggest someone in their stead. If that is the desire, I appoint Mr. Thatcher."

It will be observed that this is not a final Order, but only to be an appointment of Mr. Thatcher in case that is the desire of the Interveners. Previous to this colloquy it is true the court stated:

> "With best wishes and success of the administration that will be the order of the Court at this time. The petition is approved and the matter is *referred* to the three trustees named." (Italics ours.)

Obviously the court did not intend by the language used in the oral opinion to constitute such opinion a final appealable order. The language used throughout the opinion negatives any such intention.

The Clerk of the court has no judicial powers. The Minute Order entered by the Clerk must obviously receive any efficacy that it might have from the opinion of the court. Unless the opinion of the court constitutes an Order, the Minute Order cannot strengthen the Appellee's position on its Motion here.

As heretofore pointed out, the oral opinion did not completely dispose of the matter then at issue but only indicated the course that was to be pursued. In such a situation, the opinion could not constitute a final appealable order. See the following authorities:

In re Hurley Mercantile Co., 56 Fed. (2d) 1023, wherein it is stated:

> "The bank has moved to dismiss the appeal because not taken in time. The order of the District Judge begins with a recital that the matter came on for hearing on October 24, 1931, but is not otherwise dated. It is indorsed by the clerk as filed November 6, 1931. It does not appear whether the judge took the matter under advisement until the latter date, or why the judgment was not sooner filed. The petition to this court for superintendence and revision was filed November 24, 1931. It refers to the judgment as rendered October 24th and filed for entry November 6th. Bankr. Act, § 24 c, as amended by Act May 27, 1926, § 9 (11 USCA § 47 (c), requires that such appeals be taken 'within thirty days from the time the judgment is rendered or entered'. There being thirty-one days in October, November 24th is not within thirty days from October 24th, but is within thirty days from the filing date, November 6th. Strictly speaking, a judgment is rendered when finally published by the judge orally or in writing according to the practice of the Court, and is entered when spread by the clerk upon the record or noted and filed among the papers of the court, according to its practice. 34 C. J. 'Judgments', § 175; 15 R. C. L. 'Judgments', § 11. Usually a judgment is considered as final and perfect so as to be appealable only when entered by the clerk. 34 C. J. 'Judgments', § 182; 3 C. J. 'Appeal and Error', § 1054. No transcript could be obtained of an unfiled written judgment. The statutory language fixing the time is of course important, but in the scheme of federal appeals we believe the statutes

have used the terms 'rendition' and 'entry' interchangeably rather than with technical accuracy. Rev. St. § 1008 (28 USCA § 350 note), fixed the time for writ of error or appeal as (within two years after the entry of such judgment). But Rev. St. § 1007 (28 USCA § 874), dealing with supersedeas, required action 'within sixty days * * * after the rendering of the judgment complained of'. Rev. St. § 1009, required appeal in prize cases to be taken 'within thirty days after the rendering of the decree appealed from'. The writ of error in behalf of the United States to review the overruling of a demurrer to an indictment was to be taken 'within thirty days after the * * * judgment has been rendered'. 18 US CA § 682. Appeals to the Circuit Court of Appeals must be applied for 'within three months after the entry of such judgment'. 28 USCA § 230. Like language governs appeals from orders touching injunctions and receivers under 28 USCA § 227. Under the Bankruptcy Act (section 25 (a)), by the amendment of May 27, 1926 (section 10), appeals under 11 USCA § 48 (a), must be taken 'within thirty days after the judgment appealed from has been rendered'; but an appeal under section 47 (c) as above stated 'within thirty days after the judgment * * * has been rendered or entered'. We think Congress did not intend to establish a varying standard for beginning to count the time for appeal, but intended that the time should run only from the perfecting of the judgment or order as final by its filing with the clerk. Such was the ruling made touching appeals to the Supreme Court in Seymour v. Freer, 5 Wall. 822, 18 L. Ed. 564; Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. Ed. 762; Polleys

v. Black River Co., 113 U. S. 81, 5 S. Ct. 369, 28 L. Ed. 938. In a statute relating to judgments reviewable in the Supreme Court, the term 'rendered' was held to refer to such judgments as had attained appealable perfection. Yznaga del Valle v. Harrison, 93 U. S. 233, 23 L. Ed. 892. General Order in Bankruptcy XXXVI (11 USCA § 53) fixed the time for appeals in bankruptcy as 'within thirty days after the judgment or decree', *and this was said to mean* thirty days after its entry. Conboy v. First National Bank, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal. 2 R. C. L. 'Appeal and Error', § 6. *We hold this appeal taken within thirty days from the filing with the Clerk of the judgment appealed from to be in time.*" (Italics ours.)

See

G. Amsinck & Co. v. Springfield Grocer Co.,
C. C. A. 8th Circuit, 7 Fed. (2d) 855,

wherein it was held:

"At the close of its original memorandum opinion the court said, 'Judgment accordingly', and these are the words relied on by plaintiff to show a final determination of the matter. * * *

A judgment is the final sentence of the law upon the matter at issue in the cause as presented by the record. It is the final determination of the rights of the parties in an action. In re Moseley et al., 17 Fed. Cas. 886, No. 9,868; * * *

An order for a judgment is not a judgment. In 33 Corpus Juris, p. 1055, is a very clear statement on this subject as follows: 'An order merely

directing or authorizing the entry of judgment in the case does not constitute a judgment; to have this effect it must be so worded as to express the final sentence of the court on the matters contained in the record and to end the case at once, without contemplating any further judicial action'. In 15 Ruling Case Law, p. 570, the distinction between judgments and findings and opinions is stated as follows: 'Neither the verdict of a jury nor findings of the court constitute a judgment. Nor do the conclusions of law stated by the judge during or after the trial of the case nor his opinion upon matters submitted, whether oral or in writing, necessarily form a part of the judgment proper. It has been correctly said that the decision of a court constitutes its judgment while the opinion represents merely the reasons for that judgment'. * * *

The memorandum claimed to constitute a judgment does not purport to be the final judicial act. It does not adjudge or order that plaintiff shall recover any specified amount of money; it provides that there *shall be* a judgment according to the opinion of the court—not that there *is* a judgment by the instrument filed. No execution could have been issued thereon—no appeal taken therefrom. It was merely an order for a judgment."

See

Cory v. Hamilton Nat. Bank, C. C. A. 6th Circuit, 31 Fed. (2d) 379,

wherein in a bankruptcy case one Cory, in the name of the trustee in bankruptcy, objected to certain claims. The referee held in Cory's favor on such

contention. On petition to review, the District Court handed down an opinion on August 29, 1927, and thereafter entered an Order on September 17, 1927. On October 14, 1927, an appeal was taken. The Circuit Court of Appeals for the Sixth Circuit, in disposing of a contention similar to that made by the Appellee here, held as follows:

> "The opinion concluded: 'I am constrained to hold that the order of the referee be reversed and that the proceedings be remanded to him for further steps consistent herewith'. The appeal was taken on October 14th.
>
> Appellees make the preliminary contention that there is no jurisdiction to hear this appeal because it was not taken within 30 days from August 29th, the date on which they contend 'the judgment' in the *proceedings* in bankruptcy was 'rendered'. Bankruptcy Act, § 25a, 11 US CA § 48.
>
> Appellant urges that, as only the lien is contested, section 24a, which permits an appeal from a judgment in a *controversy* arising in a bankruptcy proceeding, governs, and that under this clause appeal may be taken within 'thirty days after the judgment * * * has been rendered *or entered'*. Neither contention, however, is relevant. The judgment appealed from was rendered September 17th, not August 29th. The quoted language from the opinion was not a judgment, but merely the basis for a judgment thereafter to be entered."

We further urge in support of our contention that the opinion of the court of July 9, 1938 was not intended to be either a formal or final order; that it

does not contain many of the essentials necessary to such an order.

We must keep in mind the proceedings which were before the court. The debtor had filed its Petition for Reorganization on June 1, 1938 and the Debtor continued in possession until a hearing be had. Pursuant to the Order of the court, notice was given to the creditors and stockholders of a hearing thereon for the determination as to whether the Debtor should be continued in possession or an independent trustee appointed, to be held on the 29th day of June, 1938 (within thirty days after the approval of the Petition). Intermediate the hearing, the appellants were permitted to intervene and moved to dismiss the Petition through its Petition in Intervention upon the ground that the Petition was not filed and presented in good faith. Both matters came on for hearing at the same time. This hearing was pursuant to the requirements of 77B(c), U.S.C.A. Title 11, Section 207(c).

That subsection clearly contemplates that as a result of the hearing, the Judge *may* (a) Make permanent the preliminary order continuing the debtor in possession or appointing a trustee or trustees, or (b) Restore the debtor to possession, or (c) Appoint a trustee or trustees, or (d) Remove any trustee, and (f) Continue the debtor in possession or appoint a substitute trustee or an additional trustee or trustees.

The subsection specifically requires an order fixing the amount of the bond of every trustee. The

order *may* permit the trustee, if authorized by the Judge, to exercise the same powers as a receiver in equity * * * and *may,* subject to the authorization and control of the Judge, delegate the power to operate the business of the debtor during such period, fixed or indefinite, as the Judge may from time to time prescribe. The order *shall* require the debtor or trustee, at such time as the Judge may direct, to file * * * schedules and submit information necessary to disclose the conduct of the debtor's affairs (paragraph 77(c) (4)). The order *may* direct the debtor to prepare a list of bondholders and creditors of the debtor and the amount and character of their debt.

All of these matters were covered by the formal order of July 13, 1938. Except for the appointment or declaration of appointment of trustees, none of them were covered by the opinion or the order of July 9, 1938.

The order of July 9th did not fix the amount of the bonds to be given by the trustees. It did not authorize the trustees to exercise the powers of receivers in equity. It did not delegate to the trustees the power to operate the business of the Debtor, although it is clear from the whole record that this was desired, and neither did the order of July 9th require the trustees to file schedules and submit other information necessary to disclose the conduct of the Debtor's affairs, nor did it direct the trustees to prepare a list of known bondholders, creditors or claimants, etc. Furthermore, the order of July 9th did not deny the motion and application of the Inter-

veners, Appellants here, to dismiss the proceeding, as prayed for in the Petition in Intervention.

We direct the court's attention also to paragraph (6) of the formal order (R. 43-49), from which it will be seen that the trustees were not to take over until July 15, 1938, and the Debtor was ordered to close its books on that date.

We think it is the formal order of July 13, 1938 which is the final order and the only final order in the cause upon this subject.

In any event, we urge that the order, being deficient in all of these matters necessary and proper to be embodied within an order, was within the control of the court and Judge, the term not having expired, and that the formal Order of July 13th can be considered an amended Order, final in character, from which this appeal will lie.

Dated, Reno, Nevada,
April 3, 1939.

Respectfully submitted,

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